No. 1008

(30)

No. 335. October Term, 1941.

IN THE

Superior Court of Pennsylvania

PHILADELPHIA DISTRICT.

CITY OF PHILADELPHIA,
Plaintiff,

v.

NORMAN C. SCHALLER,
Appellant.

Brief for Appellant and Record.

Appeal From the Judgment of the Municipal Court of the County of Philadelphia, as of May Term, 1941, No. 55.

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I. STATEMENT OF THE QUESTIONS INVOLVED.

1. Did the General Assembly of Pennsylvania, by the Sterling Act of August 5, 1932, P. L. 45, 53 P. S. Section 4613 et seq., intend to grant to the City of Philadelphia the power, which the Commonwealth then lacked (or presumptively lacked), to impose a tax upon compensation paid to officers and employes of the United States Government?

Answered "Yes" by the court below.

2. Does the City of Philadelphia have the power, under the Constitution and laws of the United States, including Act No. 819 of the 76th Congress, approved October 9, 1940, 4 F. C. A., Section 13 et seq., to levy a tax upon compensation paid by the United States Government to its officers and employes for services performed in a Federal area during the year 1940?

Answered "Yes" by the court below.

3. Does the City of Philadelphia have the power, in view of the Constitution of the United States, to levy a tax upon compensation paid by the United States Government to persons engaged in military and naval services and other Federal defense work during a period of national emergency?

Answered "Yes" by the court below.

II. HISTORY OF THE CASE.

This case arises for argument upon the pleadings, which consist of a statement of claim in assumpsit (2a) and an affidavit of defense raising questions of law (4a). The statement of claim was filed in the Municipal Court by the City of Philadelphia to establish the responsibility of appellant for a tax, under the terms of the City Income Tax Ordinance approved December 13, 1939, upon his salary for 1940.

Appellant, a resident of Philadelphia, is an employe of the United States Government. During the year 1940, his services were rendered exclusively in the Federal area known as the Navy Yard at League Island, near Philadelphia.

By the terms of the above Ordinance, a tax of 1½% per annum is imposed upon the salaries, wages and other compensation of persons who reside or work in Philadelphia, to be collected at the source by employers within the City, beginning on January 1, 1940. The various Federal agencies in Philadelphia, as representatives of the sovereign United States, have refused to deduct the tax from the pay envelopes of Federal employes. Consequently, the City has made efforts to collect the tax directly from the employes themselves.

Due to the public pronouncements of the City authorities that employes of the Navy Yard are subject to the tax, and without having first obtained the advice of counsel, appellant filed a return prior to March 15, 1941, and delivered a check to the Receiver of Taxes in the amount of $38.95, constituting 1½% of his 1940 salary. Thereafter, upon the advice of counsel that a reasonable dispute existed as to whether his salary was subject to the tax, he ordered payment on the check stopped before it was presented for payment to the drawee bank.

The statement of claim was served upon appellant on May 14, 1941. Simultaneously, proceedings were begun against a number of similarly situated Navy Yard employes. The present case was selected as a test case and stipulations were filed in twelve of the other cases on May 26, 1941, with the approval of the court below, to the effect that the ultimate judgment here reached should be controlling in all the cases.

On May 23, 1941, appellant's affidavit of defense was filed, contesting the power of the City of Philadelphia to levy a tax upon the salaries of Federal employes such as defendant, under Federal and State law. On June 27, the court below (Tumolillo, J.) heard arguments on the legal questions involved, and on July 2 overruled the questions raised, entering judgment for appellee in the amount of $40.45 (11a).

III. ASSIGNMENTS OF ERROR.

Appellant respectfully makes the following assignments of error:

1. The learned court below erred in overruling defendant's second point of law, as follows:

> "2. Plaintiff has no power under the Constitution and laws of the Commonwealth of Pennsylvania, including the Act of August 5, 1932, P. L. 45, to exact the aforementioned tax." (4a)

Judgment of the court thereon:

> "The defendant's questions of law are overruled and judgment is entered for the plaintiff in the sum of $40.45, representing the amount of tax due together with interest at 6% and a penalty of one-half of one per cent. per month for four months." (11a)

2. The learned court below erred in overruling defendant's first point of law, as follows:

> "1. The Constitution and laws of the United States, including Act No. 819 of the 76th Congress, approved October 9, 1940, prohibit the plaintiff from exacting a tax on compensation received by defendant from the United States Government for services rendered in a Federal area during the year 1940." (4a)

Judgment of the court thereon:

> "The defendant's questions of law are overruled and judgment is entered for the plaintiff in the sum of $40.45, representing the amount of tax due thereon with interest at 6% and a penalty of one-half of one per cent. per month for four months." (11a)

IV. ARGUMENT OF APPELLANT.

The decision of the Municipal Court that the City of Philadelphia has power to tax Federal salaries, if it be permitted to stand unreversed, will have a far-reaching and detrimental effect not only upon the appellant and those who have stipulated that this case shall be controlling, but also upon tens of thousands of officers, enlisted personnel and defense workers of the Navy Yard, and the numerous Philadelphians everywhere who are engaged in the various branches of military and non-military service of the Government. The implications of the case are so extensive that it would be impossible to enumerate or picture them all.

A final decision adverse to appellant will likewise be adverse to all young men resident of Philadelphia, who are inducted into the military naval and air services of the United States, receiving $21.00 per month, despite the following excerpt from the opinion of the court below:

> "The defendant offers the ingenious theory that because the President proclaimed a state of unlimited emergency on May 27, 1941, the City is prohibited from imposing a tax on Federal defense workers. He argues that if the tax may be imposed on the defendant, it can be imposed on residents of Philadelphia who enter the nation's armed forces. *The certainty of an aroused and violent public opinion is sufficient insurance against any attempt by the Receiver of Taxes to impose the tax on persons who volunteer or who are inducted into the armed forces by virtue of the Selective Service Act.*" (8a.) (Emphasis supplied.)

Thus the logic of the lower court's decision has led to its suggestion that lawlessness would in this instance be meritorious. This situation requires relief, and appellant urges that the principles of statutory, if not constitutional, construction require a reversal of the judgment of the court below.

It is conceded that the broad constitutional question whether a State taxing unit may, ordinarily, tax Federal salaries has now been removed by the decision in 1938 in *Graves v. New York ex rel. O'Keefe,* 306 U. S. 466. Without that decision, it is safe to assume that the Receiver of Taxes of Philadelphia would not have included in the Income Tax Regulations the provision that salaries received after January 1, 1940 as an officer or employe of the United States Government are subject to the City payroll tax.

Appellant contends, however, that the City lacks the necessary authorization from the General Assembly to levy the tax here involved—this is the principal contention; also that Congress has affirmatively prohibited a tax for the year 1940 on salaries earned in Federal areas such as the Philadelphia Navy Yard; and that during a national emergency such as now exists a State taxing unit cannot burden the Federal Government with a tax upon those engaged in the national defense.

The first two questions are primarily matters of statutory construction, to determine the scope of the City's taxing power. The last is a matter of constitutional law based on facts of which the Court may take judicial notice. The questions are purely questions of law. There are no factual issues, and no issue of tax exemption or class favoritism is involved.

A. The City of Philadelphia Has No Statutory Power to Levy a Tax Upon Federal Salaries.

(Assignment of Error 1.)

As stated by the lower court (6a), the asserted power of the City to levy a tax upon appellant's salary must be found in the *Act of August 5, 1932*, P. L. 45, 53 P. S. Sec. 4613, known as the Sterling Act. Because of the circumstances surrounding the adoption of that Act, appellant is strongly of the belief that the legislature did not intend to grant to the City the power to tax Federal salaries.

Section 1 of the Sterling Act provides that cities of the first and second classes may levy:

> ". . . taxes on persons, transactions, occupations, privileges, subjects and personal property within the limits of such city of the first or second class, as it shall determine. . . ."
>
> "It is the intention of this section to confer upon cities of the first and second classes the power to levy, assess and collect taxes upon any and all subjects upon which the Commonwealth has the power to tax but which it does not now tax or license." (6a.)

It is to be noted that the Act speaks only in broad, general terms. There is no clearly defined intention to levy taxes on any particular group of persons.

There is no doubt what would have happened if the present case had arisen before this Court immediately after the adoption of the Sterling Act, or any time prior to the decision of the United States Supreme Court in 1938 of the *Graves* case, supra. The holding would necessarily have been (1) that the City could not constitutionally extract a tax from appellant upon his salary as a Government employe, or (2) that the legislature was presumed to have intended a con-

stitutional result in the Sterling Act, and therefore, it had not delegated to the City the power to tax Federal salaries.

It should be unnecessary to elaborate upon the history of the constitutional doctrine of intergovernmental immunity as that doctrine has been applied to public salaries. One of the important cases on this subject was **Dobbins v. Erie County,** 16 Peters (41 U. S.) 435. In that case the County of Erie, under a prior statute delegating tax powers to municipalities in Pennsylvania, had attempted to levy a tax upon the salary or occupation of a captain of the United States revenue cutter service at the Erie station. Captain Dobbins was a resident of Erie County and had voted there for a long time. The proceeding went from the state courts to the United States Supreme Court, which held, in the year 1842, that such a tax could not constitutionally be imposed, thus following the time-honored principle of constitutional government set forth in **M'Cullough v. Maryland,** 4 Wheat. 316, that the power to tax constitutes the power to destroy and that a state should not be empowered to destroy the Federal Government by burdening its instrumentalities and agents with taxation.

For a century, more or less, it was consequently recognized as the law of the United States and of Pennsylvania that the state and its municipalities had no power to tax Federal salaries, and this was considered the law in 1932 when the Sterling Act was enacted by the Pennsylvania legislature. In fact, the traditional rule of the *Dobbins* case, supra, was as recently recognized by this Court as March 13, 1935, in **Short v. Upper Moreland Township School District,** 117 Pa. Superior Ct. 227, where Judge Cunningham traced its history to that date. Certainly this Court could not be criticized for following such a well settled constitu-

tional precept at that time, without anticipating the revolutionary change subsequently by the United States Supreme Court.

In the *Graves* case, supra, the Supreme Court admittedly reversed its previous stand, and held that, under ordinary circumstances, a Federal employe could not resist state taxation on constitutional grounds.

Appellant does not wish to overlook the fact that the courts of our state are not bound, in construing our State Constitution, by decisions of the United States Supreme Court interpreting and applying the Federal constitution. This Court, therefore, can decide that, notwithstanding the decision in the *Graves case,* supra, it is unconstitutional in Pennsylvania for the State, or any subordinate authority, to levy a tax upon Federal salaries.

Regardless, however, whether the courts of Pennsylvania feel constrained to follow the *Graves* case in interpreting the Pennsylvania Constitution, appellant cannot acquiesce in the conclusion of the court below that the City has the requisite statutory authorization to levy this tax. It by no means follows that, because the constitution is not violated, the State has exerted its power to tax Federal salaries. The United States Supreme Court has expressly held that the *Graves* case does not automatically impose a state tax upon Federal salaries. On the contrary, the question of statutory construction remains, and it must be determined under state law whether the legislature has contemplated such taxation:

> **State Tax Commission of Utah v. Van Cott,** 306 U. S. 511.

In order to ascertain the legislature's intention, it is unnecessary to enter into the absorbing and difficult problem of the effect of a decision overruling a prior

decision on constitutional interpretation. Whether the first interpretation remains the law, until and as of the date of the subsequent decision overruling it, or whether the holding of a subsequent decision must be construed as having always been the law, notwithstanding the prior decision, the present question of statutory construction must be the same.

Regardless of the effect of the various decisions interpreting the constitutional doctrine of intergovernmental immunity, the legislature's intention at the time of the Sterling Act (1932) can be easily ascertained. Whether or not the *Dobbins* case (1842) was actually the law at that time, or the *Graves* case (1938) was the law, the legislature conceived the rule of the *Dobbins* case to be in effect, as did every governmental officer, State or Federal, legislative, judicial or executive. When the legislature passed the Sterling Act, one of the attending circumstances was the universally accepted rule that the State could not levy a tax upon Federal salaries. With this rule in mind, the legislature certainly did not intend to confer upon the City of Philadelphia, or any municipality within this State, the power to impose a tax upon that forbidden subject.

The court below, in deciding that the City had the necessary authorization from the legislature, has overridden every axiom of statutory construction with the following statement, unsupported by any substantiating reasoning:

> "The test of municipal power is two-fold:
>
> 1. Did the state have power to impose the tax?
> 2. Has the state failed to impose the tax? If these two questions are answered in the affirmative, then the municipality has the power to impose the tax." (6a-7a)

The guidepost to all statutory construction appears at the beginning of Article 4 of the Statutory

Construction Act of May 28, 1937, P. L. 1019. Section 51, 46 P. S. Section 551, commences:

> "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the Legislature."

When the words of a statute are not explicit, the courts and the legislature have set forth definite rules to follow in determining the intention of the legislature. The opinion of the court below, it is submitted, has failed to follow these rules.

One of the most familiar rules of statutory construction is that the legislature is presumed to have intended a constitutional result. Obviously, then, the legislature did not intend in 1932 to give the City the power to tax Federal salaries. The subsequent decision of the United States Supreme Court had no retroactive effect upon the legislature's intention as then manifested.

In construing legislation, it is no more than logical to consider the principles of constitutional law in effect at the time of enactment. Such principles are as much a part of the circumstances under which the law was enacted as any historical fact, and as such they are to be considered in determining the scope of the legislature's language:

> Section 51 of the Statutory Construction Act of 1937, 46 P. S. Section 551;
> **Orlosky v. Haskell**, 304 Pa. 57;
> **Phipps et al. v. Kirk**, 333 Pa. 478.

In the latter case, the court expressly held that the legislative intention in delegating taxing power to a municipality must be determined, inter alia, by examining the circumstances attendant upon enactment.

The judicial construction of prior statutes is written into subsequent legislation of a similar character just as fully as though the decisions were included verbatim. The interpretation placed on the prior enactments by the courts forms part of the General Assembly's intention in subsequent statutes, unless a different intention is expressed:

> *Bickley's Estate,* 270 Pa. 101, 106-107;
> *Lehigh County v. Sefing,* 289 Pa. 33, 36;
> *Barnes Foundation v. Keely et al.,* 314 Pa. 112, 122-123;
> *Bingamin's Estate,* 281 Pa. 497, 503;
> *Buhl's Estate,* 300 Pa. 29, 32;
> *Lerch's Estate,* 309 Pa. 23, 28;
> **Opperman's Estate (No. 2),** 319 Pa. 466, 468;
> **Lower Nazareth Twp. Supervisors' Appeal,** 341 Pa. 171, 175-176;
> **Electric Storage Battery Co. v. Shimadzu et al.,** 307 U. S. 5.

In the case last cited, at page 14, Mr. Justice Roberts stated, relative to Congressional legislation:

> "Congress has not seen fit to amend this statute in this respect, and we must assume that it has been satisfied with, and adopted, the construction given to its enactment by the courts."

Until the Sterling Act (1932) is specifically amended by the legislature to permit taxation of compensation paid by the Federal Government, that Act must be read as though the rule of the *Dobbins* case (1842), subsequently reiterated by the Court in *Short v. Upper Moreland Township School District,* 117 Pa. Superior Ct. 227, supra (1935), had been expressly written into the Act by the legislature.

The rule of the *Graves* case (1938) had not yet been announced by the United States Supreme Court and certainly did not by implication constitute part of the Act.

If, after the United States Supreme Court's decision in 1938, the legislature wished to take advantage of that decision and to entrust to the City of Philadelphia the power to tax Federal compensation, the appropriate method would have been to amend the Sterling Act. This was the method generally followed in other jurisdictions which had theretofore failed to tax Federal compensation.

An excellent illustration of this statutory process may be found in the Federal Income Tax Laws. Prior to the *Graves* decision, when the traditional constitutional rule of intergovernmental immunity was in effect, the Internal Revenue Code contained broad language taxing income from substantially every source, including income received from personal services, without any reference to State employes and officers. After the decision, however, the Federal Government realized that it might constitutionally tax their salaries. It is no mere accident that the Federal authorities refused to rely on the general language of the existing law. Instead, Section 22 (a) of the Code was expressly amended by Act of Congress of April 12, 1939, to include salaries received for "personal service as an officer or employee, or any instrumentality of any one or more of the foregoing."

The Congress proceeded further in connection with the change in constitutional law, by adopting the Public Salary Tax Act of June 29, 1939, as amended (26 U. S. C. A. Section 22), consenting to State taxation of compensation received for Federal services after December 31, 1938. As with the *Graves* case, however, the Public Salary Tax Act is not self-implementing.

The State must affirmatively exercise the power which the United States Supreme Court and Congress have now said the states may exercise over Federal compensation.

Just as the Internal Revenue Code extended the Federal Tax Laws after the *Graves* decision, to include compensation paid by the states, various states then extended their laws to tax Federal salaries. Many states enacted constitutional or statutory amendments which specifically included compensation to Federal employes in order to carry out the decision in the *Graves* decision. Among them are the following:

Ala.—Laws of 1939, H. B. No. 54.
Cal.—Laws of 1939, c. 915, Sec. 3.
Del.—Laws of 1939, c. 62.
Idaho—Laws of 1941, c. 12.
Iowa—Laws of 1939, c. 178, S. F. No. 467.
Minn.—Laws of 1939, c. 446.
N. Y.—Laws of 1939, c. 619.
N. C.—Laws of 1941, H. B. No. 11, Sec. 5 (a) (and also Revenue Act of 1939, Sec. 317).
N. D.—Laws of 1941, H. B. 248.
S. C.—Laws of 1939, H. B. No. 339 and S. B. No. 921.
Wis.—Laws of 1939, c. 293.

Other states, after 1938, including Arkansas, Georgia, Mississippi, Montana, Oklahoma, Utah and Vermont, positively demonstrated their intention to tax Federal salaries by repealing the clauses of exemption which had been part of their tax statutes prior to the *Graves* case.

Thus, substantially every state which has an income tax law and which has sought to tax Federal salaries has specifically amended its law accordingly.

In the absence of such an amendment by the General Assembly of Pennsylvania, it must be presumed that the legislature did not intend to include such salaries within the taxing laws of either the State of Pennsylvania or its political subdivisions.

If the Federal Government has found it necessary to refer to such salaries specifically, as have numerous of our sister states, it should be even more necessary where the legislature delegates its taxing power to a subordinate agency. If the General Assembly had intended to vest such power in the City of Philadelphia, it would have done so by specific words.

The City contends that, by virtue of dictum in *Blauner's, Inc. et al. v. Phila. et al.*, 330 Pa. 348, the City has the power to tax not only such subjects as could have been taxed by the legislature when the Sterling Act was passed in 1932, but also any power to tax which the state might subsequently have acquired. This is the effect of the City's argument, since the decision in the *Graves* case was tantamount to a constitutional amendment reserving broader tax powers to the State.

This argument overlooks the clear wording of the Sterling Act and the tense employed by the legislature. Manifestly, the General Assembly did not intend to delegate power in such a broad and unrestricted fashion to the City. The elementary canons of interpretation, as applied to taxing statutes, defeat the construction contended for by the City; otherwise, there would be a complete abandonment, in futuro, of the State's sovereign prerogative to a subordinate municipal corporation.

The following quotations should serve to answer the City's contention. In *New York & Erie R. R. Co. v. Sabin*, 26 Pa. 242, 245, the court said:

> ". . . the surrender [of the taxing power of the legislature] is not to be presumed, but must be evinced by terms so explicit as to leave no doubt of the legislative intention to part with it."

In *Hillman C. & C. Co. v. Jenner Township et al.*, 300 Pa. 108, 112, the court said:

> "'It is a principle universally declared and admitted that municipal corporations can levy no taxes, generally or special, upon inhabitants, or their property, unless the power be plainly and unmistakably conferred': 4 Dillon on Municipal Corp. 2398. And the ground of such right is to be strictly construed, and not extended by implication: Com. v. P. R. T., 287 Pa. 190."

The opinion of the court below, following the argument of the City, took the view that the decision of the Supreme Court in *Marson v. Philadelphia, et al.*, 342 Pa. 369, holding state employes liable for this tax, is authority to support the conclusion that Federal compensation is likewise taxable by the State. The holding of the *Marson* case is that the traditional rule of governmental immunity does not apply to the relationship between the State and its political subdivisions and, therefore, there has never been any constitutional prohibition of a city tax upon state salaries. The distinction between that case and the present case is obvious. In fact, the court brought the difference out in the following paragraph of the opinion (at p. 371):

> "It is the contention of appellant that 'if the traditional rule of governmental immunity is still the law in Pennsylvania, the result must be that no municipality in this State can levy a tax upon the salaries of officers and employes of the Commonwealth'. The 'governmental immunity' in-

voked is based on a principle applicable only to the taxing relations of the federal and state governments. There is a doctrine of implied limitation of the power of the federal government to tax a state or any of its instrumentalities, and of the power of any state to tax the federal government or any of its instrumentalities. The doctrine stems from McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, and has frequently received judicial recognition."

The major difference between the two situations is that in 1932 it was lawful, constitutional and customary in Pennsylvania for municipalities to tax State occupations and salaries, **(C'm'rs of Northumberland County v. Chapman,** 2 Rawle 73; **Brown's Appeal,** 111 Pa. 72, 80, and intervening cases), whereas Federal officers and employes were considered and treated as immune from 1842 (*Dobbins* case, supra) until 1938 under the implied doctrine of immunity.

Although the Supreme Court has held that the General Assembly intended in 1932 to give the City the power to tax State employes, no such intention existed as to Federal salaries then enjoying immunity. The legislature intended to confer upon the City only such power as it then possessed or presumed it possessed, and was not exercised by the State. Certainly the State did not intend to delegate to the City unlimited and unrestricted power to tax all subjects which the State might subsequently acquire through constitutional change, whether by formal amendment or by judicial decision, or otherwise.

The necessity of discussing technical rules of statutory construction so extensively, is to be regretted, particularly when the legislative mind is so clear. If this argument, however, has created "any fair, reasonable doubt" as to the power which the City seeks to

exert, the judgment of the lower court should be reversed. In construing the Sterling Act, the controlling rule is that, whenever the power of a municipal corporation is called into question, "Any fair, reasonable doubt as to the existence of the power is resolved by the courts against its existence in the corporation, and therefore denied:"

Leslie v. Kite, 192 Pa. 268, 274;
Wentz v. Phila. et al., 301 Pa. 261, 271;
Valley Dep. & Tr. Co. of Belle Vernon, 311 Pa. 495, 497-498;
Fey's Appeal, 68 Pa. Superior Ct. 40, 42.

B. Congress by Public Act No. 819, Approved October 9, 1940, 4 F. C. A. Section 13 et seq., Prohibited Taxes on Salaries Earned During 1940 in Federal Areas Such as the Navy Yard.

(Assignment of Error 2.)

Appellant was employed during 1940 exclusively in the Philadelphia Navy Yard. The site of this Yard was ceded by the Commonwealth of Pennsylvania to the Federal Government under the Acts of February 10, 1863, P. L. 24, and April 4, 1866, P. L. 96, 74 P. S. Section 1 note. Congress accepted the same by Act of February 18, 1867, c. 46, 14 Stat. 396. By this transfer to the Federal Government complete jurisdiction passed from the Commonwealth of Pennsylvania, which thereby surrendered the right to tax persons and property within that area.

On October 9, 1940, Public Act No. 819 of the 76th Congress, 4 F. C. A. Sec. 13 et seq., was approved, ostensibly to remove the disability of state taxing authorities to reach subjects within such areas as the Navy Yard. Section 1 (a) provides for sales and use taxes, and Section 2 (a) for income taxes. The latter provision is as follows:

"Sec. 2 (a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

But this provision, as well as that of Section 1 (a) is expressly limited to transactions occurring after December 31, 1940, and subsection (b) of both sections prohibits tax prior thereto. Section 2 (b) reads as follows:

"(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940."

Congress thus intended to prohibit a tax on income received for services in Federal areas prior to December 31, 1940, and this prohibition bars any recovery by the City in the present case. The statement by the court below that this argument would apply only to non-residents employed at the Navy Yard is unsupported (8a).

The question may be asked whether, under the Federal Constitution, Congress can thus bar the City from taxing such salaries during 1940. In *Graves v. New York, ex rel. O'Keefe,* 306 U. S. 466, supra, at pages 478 to 479, the Court avoided this question, although previous decisions appeared to constitute full warrant for a prohibition against such taxation. The more recent decision in **Pittman v. H. O. L. C.**, 308 U. S.

21, would seem to remove the doubt. The State of Maryland's contention that Congress cannot "grant an immunity of greater extent than the constitutional immunity" was rejected by Chief Justice Hughes, (page 33,) with the following quotation from **M'Cullough v. Maryland**, 4 Wheat. 316, at page 426:

"A power to create implies a power to preserve."

As to compensation earned by Government employes in Federal area in 1940, the City Tax violates Section 2 (b) of the Act of Congress. The City cannot refuse to obey the Congressional mandate so clearly expressed.

C. A State or Municipal Tax on Compensation Paid to Federal Defense Workers Is Unauthorized.

(Assignment of Error 2.)

On May 27, 1941, the President of the United States proclaimed an unlimited national emergency, requiring that the country's military, naval, air and civilian defenses be put on the basis of readiness to repel any and all acts or threats of aggression toward any part of the Western Hemisphere. Of this proclamation and the situation which is becoming more and more serious, the Court may take judicial notice:

Angelicchio v. Director General of Railroads, 81 Pa. Superior Ct. 393, 396;
Com. ex rel. v. Ball et al., 277 Pa. 301;
Peterson et al. v. McNeely, 125 Pa. Superior Ct. 55;
Bell Tel. Co. of Pa. v. Pa. P. U. C., 135 Pa. Superior Ct. 218, 226, appeal dismissed 309 U. S. 30;
Ohio Bell Tel. Co. v. Comm'n, 301 U. S. 292, 301.

The Court is also fully acquainted with the fact that every person employed in the Navy Yard, as well as every person in the military, naval, and air services, is an integral part of the Government's effort to carry out the gigantic task which confronts the country.

The burden of the City's tax upon defense workers, civilian and non-civilian, in the Navy Yard, the training camps, and elsewhere, imposed simply because they live or perform their duties in Philadelphia, is a real burden upon the Government itself, apart from the added burdens of collection at the source and penalties which the City seeks to thrust upon the Government. A tax of this sort is calculated to affect the morale of those of our citizens who are receiving the small sum of $21. per month for patriotically surrendering their ordinary occupations and activities, or who are skilled workers and can obtain lucrative jobs elsewhere free from this municipal burden.

The inevitable consequence that this is burdensome on the Government and its defense operations is apparent. The Government should not be hampered at the present time with the necessity for increasing the compensation of those whom it now employs because of such local interference. It should not be confronted with discontentment and unrest for reasons of local municipal convenience. Nor should it be faced with a multiplicity of lawsuits which its employes must take time out to defend.

Nothing in the *Graves* case requires the conclusion that a state or municipal tax on Federal salaries cannot be a burden at any time or under any conditions on the Government itself. The Supreme Court has clearly left the way open for a decision that, in the unusual circumstances now existing, a tax upon defense workers has the effect of unduly burdening the United States of America. The means of carrying on our

national defense should not be subjected to local taxation:

U. S. Service Prod. Corp. v. Lincoln County et al., 285 F. 388;
Clallam County v. U. S. et al., 263 U. S. 341.

And, as stated at the beginning of this brief, the answer of the court below that public opinion will protect against enforcement of the tax power asserted by the City, is no solution in an orderly system of government. Anarchy should not be invited.

For the independent reasons that the state legislature has not delegated the required authority to the City, that Congress prohibited a tax on services performed in the Navy Yard during 1940, and that appellant is an essential part of the Government's machinery of defense, your Honorable Court is respectfully requested to reverse the judgment of the court below and to sustain the Affidavit of Defense.

Respectfully submitted:

EDWARD I. CUTLER,
MICHAEL FRANCIS DOYLE,
Attorneys for Appellant.

I hereby certify that the cases cited herein from other than the Official Pennsylvania Reports do not appear therein.

EDWARD I. CUTLER.